

JUL 2 1968

3495  
v. 3495

NO. 22615

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WILLIAM NEIL TURNBULL, )  
 )  
Plaintiff-Appellant, )  
 )  
vs. )  
 )  
JOSEPHINE BONKOWSKI & LEONARD KING, )  
 )  
Defendants-Appellees. )

BRIEF OF PLAINTIFF-APPELLANT

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Statutes

Statute of Limitations: "No persons may bring an action...for any injury to the person...unless commenced within two years". (Section 09.10.070, Alaska Statutes). 6

Disability of a Minor: "If a person entitled to bring an action...is at the time the cause of action accrues...under the age of 19 years...the time of the disability is not a part of the time limited for the commencement of the action. But the period within which the action may be brought is not extended in any case longer than two years after the disability ceases." (Section 09.10.140, Alaska Statutes). 6

Computation of time: "The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.080)..... 6, 13-14



Applicability of Act: "The provisions of this Act shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature." (Chapter 62, Section 1, Laws of Alaska)..... 13

Applicability of Common Law: "So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the Legislature of the State of Alaska is the rule of decision in this state." (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.010)..... 12





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BRIEF OF PLAINTIFF-APPELLANT

Statement of Jurisdiction

This appeal is from the United States District Court at Alaska, the Honorable James A. VonDer Heydt presiding.

The district court had jurisdiction pursuant to Chapter 85, Title 28, United States Code, Section 1332, by virtue of the diversity of citizenship of the parties-- the Plaintiff being a resident of the State of Illinois and the Defendants being residents of the State of Alaska--, and the amount in controversy in the proceeding exceeded \$10,000.00, exclusive of interest and costs (Complaint of the Plaintiff, paragraphs "1" through "4"; R.1).

The Court of Appeals has jurisdiction to review the judgment order of the District Court on November 17, 1967,



by virtue of the Notice of Appeal under Rule 73(b) filed by the Plaintiff on December 14, 1967 (R.50).

Statement of the Case

1. The Complaint

Plaintiff-Appellant, William Neil Turnbull, filed his Complaint on January 25, 1966, at 10:44 A.M., alleging that he sustained personal injuries, which included extensive damage to one eye, by virtue of the explosion of a rifle shell sold to him when he was a minor of the age of 11 years by the Defendant, Josephine Bonkowski, while she was in the employ of the Defendant, Leonard King; the Complaint further stated that said sale by the Defendants to the Plaintiff was in violation of a territory law and code forbidding the sale of rifle shells, gun powder, and other explosives, to a minor and imposing absolute liability for injuries sustained by the minor as a result of the sale. Damages of \$150,000.00 were sought (R.3-4).

The Complaint was originally filed on said date, and at said time, in the United States District Court for the Northern District of Illinois, Eastern Division (R.3); and on August 2, 1966, the case was transferred to the United States District Court of Alaska, at Fairbanks (R.25).



## 2. Defendants' Motion for Summary Judgment

After the transfer and service of summons on the Defendants, the Defendants moved for summary judgment, contending that the Plaintiff was barred by the statute of limitations (R.30).

## 3. The Facts

Plaintiff was injured on June 15, 1956, when he was eleven years old (R.1).

Having been injured during his minority, he filed his Complaint on January 25, 1966, at 10:44 A.M. (R.1), on his twenty-first birthday; for he was born on January 25, 1945, at 1:29 P.M. (R.38).

## 4. The Decision of the District Judge

On November 17, 1967, the district judge, ruling that the limitation period expired on January 24, 1966, (the day before the case was filed), (R.48), granted the Defendants' motion for summary judgment "as a matter of law" (R.49).

This appeal by the Plaintiff followed.

### Specification of Errors

Plaintiff-Appellant contends that the district judge erred:



1. In ruling that the time for Plaintiff to commence his litigation expired on January 24, 1966, the day before the case was filed; and
2. In granting the motion for summary judgment by the Defendants-Appellees.





## ARGUMENT

### I. STATUTORY DIRECTION CONTROLS THE COMPUTATION OF TIME.

Plaintiff became 19 years of age on January 25, 1964. He had until midnight on January 25, 1966, to file his action.

The sole issue in this case is whether the Plaintiff filed his action within the period of the Alaskan statute of limitations, and said issue is resolved by a determination of the date Plaintiff reached the age of 19 years. The controlling question in this determination is: in computing the time within which a thing must be done, is the day on which the initial act occurred included or excluded in counting the time?

The district judge included the date of Plaintiff's birth (January 25, 1945) in computing his age and ruled that he was 19 years of age on January 24, 1964. Plaintiff-Appellant contends this ruling was erroneous and that, by statutory direction (expressing legislative intent), the date of Plaintiff's birth should be excluded in computing his age and that he, accordingly, became 19 years of age on January 25, 1964. By the judge's ruling, it is asserted



that Plaintiff filed his action one day late; whereas, Plaintiff-Appellant contends he filed on the last day permitted pursuant to statutory direction.

### Statutes Applicable

The Alaska Statutes provide, in relevant part:

1. Statute of limitations: "No persons may bring an action...for any injury to the person...unless commenced within two years". (Section 09.10.070, Alaska Statutes). (R.31).
2. Disability of a minor: "If a person entitled to bring an action...is at the time of the cause of action accrues...under the age of 19 years...the time of the disability is not a part of the time limited for the commencement of the action. But the period within which the action may be brought is not extended in any case longer than two years after the disability ceases." (Section 09.10.140 Alaska Statutes). (R.31).
3. Computation of time: "The time in which an act provided by law is required to be done is computed by excluding the first day and including



the last, unless the last day is a holiday,  
and then it is also excluded." (Title I,  
Alaska Statutes, Article 3, Section 80)

(R.36). (Neither January 24 nor January 25,  
1966, were holidays.)

Plaintiff submits that the statutory direction as to  
computation of time applies and that, accordingly, the  
complaint was filed within the time prescribed for com-  
mencing the action.

#### Mathematics

Applying the Alaska statute for computing time:

1. 19 years of age: As directed, the date of  
Plaintiff's birth (January 25, 1945) should  
be excluded and January 25, 1964, the 19th  
anniversary date should be included. Accord-  
ingly, Plaintiff's disability--the time he  
was under 19 years of age--ceased on  
January 25, 1964.
2. Two years after the disability ceased: As  
directed, the date the disability ceased  
(January 25, 1964) should be excluded and the  
date two years thereafter (January 25, 1966)



should be included in computing the time within which the action may be brought.

By reason thereof, Plaintiff had until midnight on January 25, 1966, to file his case, and he did so file his action.

By way of analogy, a person of legal age injured in Alaska on January 25, 1964, would, undeniably, be permitted until midnight on January 25, 1966, to file his action.

The computations of time for commencing an action should be identical in the instances where a minor's disability ceases as where a person is injured on the same date.

#### Cases Computing Time

As might be expected, cases involving the issue in the case at bar, with a statutory direction as to time computation, are rare; for, in almost all instances, the litigation is commenced in advance of the last date for filing.

(Parenthetically, Plaintiff had sought legal representation in Juneau, Alaska; had retained local counsel to commence his suit; and was of the belief his case was filed in Alaska. However, on January 24, 1966, while in Alaska and in inquiring as to the progress of his case, he was advised





by his attorney in Juneau, for the first time, that said attorney would not prosecute his claim and had not filed, and would not file, Plaintiff's case. Plaintiff, unable to retain other Alaskan counsel on said date, called by long distance the attorney for his parents in Chicago at 4:20 P.M. on Monday, January 24, 1966, and the lawsuit was filed in Chicago the following morning. This action of the attorney in Juneau who was retained by Plaintiff in failing to file the case, or to advise Plaintiff of his absence of filing, is the subject of a bar association inquiry in Alaska.)

Lowe v. Hess, 1941, DC, 10 Alaska 174, involved a determination of the time computation for the filing of mining claims. As directed by statute, the first date was excluded and the last date included.

Wade v. Dworkin, 1965, Alaska, 407 P. 2d 587, involved a determination of the time for filing an election contest and whether a Sunday is included in said time. This case is commented upon more extensively hereafter, pages "13" and "14".



II. THERE ARE NO COMMON LAW EXCEPTIONS TO THE  
STATUTORY DIRECTION FOR COMPUTATION OF  
TIME IN ALASKA.

The Minnesota decision in Nelson v. Sandkamp  
is contrary to Alaska law.

The District Court judge accepted Plaintiff-Appellant's recitation of the applicable statutory direction in the computation of time; however, the judge asserted a "common law exception thereto" in determining age (R.47, 48). Plaintiff submits that there is no "common law exception" in view of the statute.

The inclusion or exclusion of the day of birth in computing one's age is treated in an American Law Reports Annotation, 5 A.L.R. 2d 1143; and the difficulties, at common law, in applying various rules, and the fallacies therein, are recited in said annotation. The general common law rule is recited at page 1147 of the annotation, "Where common law prevails, one's age is computed by including the day of his birth so that a given age is attained the day before his birthday anniversary, no other method being prescribed by statute." (Emphasis added). No Alaska cases are cited in support of the "common law rule".



Cited in support of said "common law rule" is the case of Nelson v. Sandkamp, 1948, 227 Minn. 177, 34 N.W. 2d 640, 5 A.L.R. 2d 1136, and this case is the apparent basis for the trial court's ruling (R.48).

This decision in the Nelson case has not been cited by any other appellate court.

The Minnesota Supreme Court permitted the action by the plaintiff since the court ruled that the statute of limitations was tolled while the defendant departed from and resided out of the state. However, the court recited, by way of dicta, that, where the plaintiff was born on October 21, 1923, and reached his 21st anniversary on October 21, 1944:

- (i) The general rule for the computation of time is to exclude the first and include the last day, p. 179;
- (ii) The common law has, however, recognized an exception in computing age by including the day a person is born, even though born on the last moment thereof, p. 179;
- (iii) The Minnesota Statute for time computation expresses "the general common-law rule and does not presume to abrogate the well established exception thereto governing the computation of a person's age," pp. 179, 180; and



(iv) "The prevailing rule, therefore, governs in this jurisdiction." p. 180.

Hence, the Minnesota Court said that the plaintiff therein reached 21 on October 20, 1944.

The Decision in Nelson v. Sandkamp  
is contrary to Alaska Law.

The statement in the Nelson case of a "common law exception" is inconsistent with the Alaska statute relating to computation of time.

Furthermore, there is a statutory direction pertaining to the applicability of common law in Alaska. This statute provides:

Applicability of common law: So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the Legislature of the State of Alaska is the rule of decision in this state. (Title I, Alaska Statutes, Article I, Section 10; also cited as Section 01.10.010.)

The exact question of applicability of the common law in the face of legislative intention was present in the case





of Wade v. Dworkin, 1965, Alaska, 407, P. 2d. 587, where the Alaska Supreme Court was presented with various common law holdings on the issue of whether an intervening Sunday was to be included in interpreting the "computation of time statute", (which is the same statute involved in the case at bar), where an election contest had to be filed within five days.

In the Wade case, the Alaska Supreme Court stated that, in resolving any issue relating to the "computation of time statute" and its applicability to the provision in question, "we are enjoined by the legislature to observe the provisions (of the statute)... 'in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature'," 407 P. 2d P. 589, citing Laws of Alaska, Chapter 62, Section 1:

Chapter 62, Section 1 provides:

Applicability of Act: the provisions of this Act shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature.



The Alaska Supreme Court designated the common law rule in "some jurisdictions" of excluding a Sunday if the period involved does not exceed a week, p. 589.

"On the other hand, under statutes containing language similar to AS 01.10.080, it has been generally held that intervening Sundays are to be included in computing the time period even though the applicable period is less than one week," p. 590.

Therefore, after citing cases that the statute changes the common law, the court ruled, "In view of these authorities, and the language of AS 01.10.080 (the computation of time statute), we hold that in computing the five day period of limitation prescribed by AS 15.20.430 (for election contests) an intervening Sunday is to be included in the computation of the five day period provided for in AS 15.20.430. We are of the opinion that such a construction is not inconsistent with any ascertainable "manifest intent of the legislature," in regard to its enactment of AS 15.20.430 and AS 01.10.080."

Likewise, in the case at bar, no "common law exceptions" should apply to the computation of time as expressed by the legislature in enacting the statute applicable to this case;



and a construction comparable to the recitation in the Nelson case would be inconsistent to the ascertainable "manifest intent of the legislature."

III. THE RULING URGED BY APPELLANT PROVIDES UNIFORMITY IN THE LAW.

The Alaska statute for computing time compels a conclusion that, excluding the date of his birth, the Plaintiff became 19 on his nineteenth anniversary, January 25, 1964, and that until said date he was 18 and under a legal disability.

Undoubtedly, the statute was enacted to avoid any confusion, or exceptions, in the computation of time: the first day is excluded the last day included; Plaintiff became 19 on January 25, 1964.

Furthermore, there is uniformity in declaring that a person is of a particular age on the applicable anniversary date of his birth; there is no mystery in so holding and certainly custom and common usage so believe.

Questions of when one reaches voting age, can legally drink intoxicating liquors, can legally contract bindingly, can devise real estate, can commence an action in his own name, and others, all may be resolved by a holding in



accordance with the statutory direction that a person becomes of age on the anniversary date of his birth, not before.

CONCLUSION

For the foregoing reasons, we respectfully ask the Court to reverse the judgment appealed from and to remand the case with directions that Defendants' motion for summary judgment be denied and that they answer the Complaint of Plaintiff in order that the case may proceed to trial on the merits.

Respectfully submitted,

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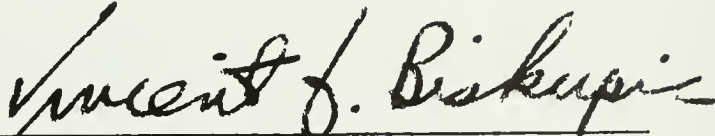
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Attorney's Certification

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

  
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